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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RICARDO D. RAMIREZ, Plaintiff and Appellant, v. DORIS WHITE, Defendant and Respondent.	A094769 (San Mateo County Super. Ct. No. 403175)

Ricardo Ramirez brought suit against Doris White, and others, alleging as to White, that she had breached a contractual obligation to sell a parcel of real property to Ramirez, selling it instead to Eveline Eisen. The trial court granted summary judgment to White, and Ramirez appeals.

Background

White owned a residence and an adjoining lot in Hillsborough, California, and desired to sell them together. Ramirez was interested in the lot, and Dan Eisen, Eveline Eisen's husband, was interested in the residence. In February 1997, Ramirez, Eisen and White accordingly entered into a real estate sales contract for the sale of both properties. The contract provided, among other things, that escrow was to close on June 1, 1997, that time was of the essence, and that Ramirez and Eisen reserved the right to separate the contract into two separate transactions at any time prior to closing.

Access to the unimproved lot could be had only by means of a driveway across the improved lot. On June 9, 1997, the parties were able to obtain a variance from the Town of Hillsborough permitting the construction of the driveway, but the town made it clear

that the variance was not to be viewed in any way as an agreement that the two parcels could be developed separately. Ramirez apparently became concerned that he would be unable to develop the unimproved lot. In any event, escrow did not close on June 1, 1997. On June 22, 1997, Ramirez and White signed an addendum to the purchase agreement that provided that Ramirez and/or his wife, Maria Ramirez, would purchase the unimproved lot, that the purchaser would remove all contingencies, that escrow was to close no later than July 10, 1997, and that the transaction was subject to the purchaser's ability to obtain title insurance.

Ramirez never deposited the purchase price into escrow. On June 26, 1997, however, he wrote to the realtors handling the transaction that the title insurance company would not issue a title insurance policy that would guarantee that the lot was a legal lot, but "[p]lease be advised that I am ready to close escrow as soon as the seller can provide the necessary proof that will guarantee that the [unimproved lot] is a legal lot in the town of Hillsborough."

The proof sought by appellant was not provided. The parties continued to communicate about the purchase. White was anxious to sell, and by September 1997, indicated that she was ready to list both parcels for sale to third parties. On the same date, the realtors drafted a memorandum of understanding, asserting that Eisen intended to purchase both parcels himself, and that Eisen and Ramirez would enter into a collateral agreement by which Eisen would transfer title to the unimproved lot to Ramirez at a purchase price of $340,000, with the transfer to occur on January 2, 1998. Ramirez, through his attorney, indicated that he was interested in this course of action, although he also was concerned that Eisen was attempting to "go around [him]." Ramirez and Eisen met on October 10, 1997, after which Ramirez's attorney prepared a proposed agreement under which Eveline Eisen was to sell the unimproved lot to Maria Ramirez on the condition, among others, that the purchaser was able to obtain a building permit on the unimproved lot. The proposed agreement never was executed. In early October 1997, White sold both the residence and the unimproved lot to Eisen.

This suit followed.

Ramirez sought damages from White on the theory that she had breached the purchase agreement by failing to sell the property to Ramirez. White moved for summary adjudication on the grounds that White's contractual obligations were discharged when Ramirez failed to deposit the purchase price into escrow by July 10, 1997, as required by the addendum to the February 1997 real estate purchase agreement.

Ramirez conceded that he had not deposited the purchase price into escrow. He pointed out, however, that White had a number of duties under the agreement, such as to deliver title "free of liens, encumbrances, easements, restrictions, rights and conditions" except as specified, and to deliver a standard policy of title insurance showing title vested in the buyer subject only to the listed encumbrances. Ramirez claimed that White's inability, refusal and/or failure to perform precluded her from declaring Ramirez to be in default. Ramirez contended that he was not required to deposit the purchase price into escrow until White had shown that she could deliver proper, insurable, title. Finally, Ramirez argued that even if he had been required to tender the purchase price, he did so by means of his June 1997 letter to the real estate agent that he was ready "to close escrow as soon as the seller can provide the necessary proof that will guarantee that the [unimproved lot] is a legal lot in the town of Hillsborough."

Ramirez reasserts all three arguments on appeal, arguing also that the terms of the contract altered the common law rule requiring him to tender his own performance before seeking damages from White.

DISCUSSION

I.

Tender of Performance

Ramirez concedes that his duty to deposit the purchase price into escrow was concurrent with White's contractual obligations. Concurrent conditions are mutually dependent, and the failure of both parties to perform during the time for performance results in a discharge of both parties' duty to perform. (*Pittman v. Canham* (1992) 2 Cal.App.4th 556, 559-560.) Thus, although it is true that White could not declare Ramirez to be in default without tendering her own performance, it also is true that

Ramirez could not recover for any failure of White to perform her contractual duties without showing that he had performed his own contractual duty, or at least that he had tendered his performance. (*Id.* at p. 559.)

Ramirez did not deposit the purchase price into escrow, but claims that he tendered his performance by means of his June 26, 1997 letter to the realtors. "A tender is an offer of performance made with the intent to extinguish the obligation. [Citation.] When properly made, it has the effect of putting the other party in default if he refuses to accept it. [Citations.] . . . . [¶] However, a tender to be valid must be of full performance [citation], and it must be unconditional." (*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385.) Thus, a "mere indication of a willingness to perform in the future is not the equivalent of a valid, subsisting tender." (*Waller v. Brooks* (1968) 267 Cal.App.2d 389, 394-395.) In addition, to be valid, the tender must be made by the "debtor" to the "creditor" or some person such as an escrow agent, who is authorized to receive or collect what is due. (1 Witkin, Summary of Cal. Law (9th ed. 1987 and 2001 supp.) Contracts, § 716, p. 649; and see authorities cited there.) Here, Ramirez did nothing more than advise that he was willing to perform at some time in the future. The letter was nothing that White could "accept" such that a failure to accept it would put her into default. Moreover, Ramirez did not even communicate this willingness to White or to the escrow agent. He wrote to the realtors. In short, the letter was not a tender, and was not directed to anyone who had the authority to accept Ramirez's "offer."

II.

Ramirez's Arguments

Ramirez, citing Paragraph 17(D)(3) of the original agreement, contends that the general rule set forth in *Pittman* does not apply where, as here, the parties' agreement specifies a means of termination. Paragraph 17 provides that the contract might be null and void unless certain contingencies were removed within the specified time. Subparagraphs D (1) and (2) gave Ramirez the option to notify White of any unsatisfactory items. If White failed to respond to that notification, Ramirez became entitled to give written notice of cancellation. Should Ramirez fail to give written notice

of cancellation, subparagraph (D)(3) permitted White to cancel the contract by giving written notice to Ramirez. Paragraph 17(D), therefore, simply provided a means of canceling the contract in specified circumstances. That a contract provides a means for cancellation, however, has no effect on the rule that when the time for performance of a concurrent condition arises, and no performance is made or tendered, the other party's contractual duties are discharged.

Ramirez emphasizes the evidence that the parties continued to discuss the transaction after July 1997, that White expressed some willingness to sell both parcels to Ramirez beyond July 10, 1997, or that she agreed to sell both parcels to Eisen after that date. Nothing in these facts supports Ramirez's theory that White had agreed to extend the date for the close of escrow to a later date. To the contrary, by September, White was threatening to list the properties for sale to third parties. In short, the evidence is consistent only with the recognition by the parties that the time for performance of the original contract, and the June 1997 addendum, had passed, and that they therefore were attempting to negotiate a new, albeit related, arrangement.

Ramirez, citing Civil Code section 1501 and Code of Civil Procedure section 2076, contends that White waived any complaints she might have had about the tender. Civil Code section 1501 provides that "[a]ll objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated." Code of Civil Procedure section 2076 provides: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms of kind which he requires, or be precluded from objecting afterwards." These sections "are primarily intended to protect debtors/offerors who perform or tender performance in good faith from harm by creditors/offerees who refuse to accept or intentionally fail to demand proper tender." (*Sanguansak v. Myers* (1986) 178 Cal.App.3d 110, 116-117.) They are *not* intended to prevent a party from arguing

that an advisement of a willingness to perform, which does not amount to an offer of performance, is not a tender at all, particularly where the advisement was made to someone with no power to "accept" it. Ramirez's advisement that he would perform sometime in the future simply was not a tender, and White had no obligation to point that fact out to him.

Ramirez argues that anti-forfeiture principles should act to prevent him from forfeiting his contract rights. If this argument were to be accepted, it would completely undermine the law of concurrent conditions. In all events, Ramirez has not suffered forfeiture; he simply did not get what he had expected and hoped to get. *Leslie v. Federal Finance Co., Inc,* (1939) 14 Cal.2d 73, cited by Ramirez, provides an instructive contrast. There, the plaintiffs had an equity interest in property, worth approximately $12,000, which they forfeited when the defendant, after tendering its own performance, refused to accept a performance that failed perfectly to conform to certain requirements. The appellate court ruled that the equitable doctrine against forfeiture empowered the trial court to provide relief to the plaintiffs so that they would not forfeit their equity interest. (*Id.* at p. 81.) Here, application of the rules of concurrent conditions did not and does not cause Ramirez to forfeit anything other than the incidental expenses inherent in any land transaction that may or may not result in transfer of title. Again, the failure to realize an expectation is not forfeiture.

Finally, Ramirez, citing *Rubin v. Fuchs* (1969) 1 Cal.3d 50, *Diamond v. Huenergardt* (1959) 175 Cal.App.2d 214, and *Groobman v. Kirk* (1958) 159 Cal.App.2d 117, asserts that he could bring suit against White without tendering the purchase price because a buyer is not required to deposit the purchase price into escrow until the seller shows that she can deliver proper, insurable, title. We agree that a buyer is not required to deposit the purchase price until the seller shows that she can deliver title, but we do not agree that it follows that the buyer can bring suit against the seller without having tendered the purchase price, and we do not find that the cases cited by Ramirez stand for that proposition.

The court in *Rubin* found only that where a buyer's ability to perform is in some way dependent on action by the seller, the seller cannot refuse to take that action, thereby preventing the buyer's performance, and then unilaterally rescind the agreement on the grounds that the buyer breached. In that case the buyer was required to deposit into escrow a grant deed containing a clause providing for the release of each subdivided lot. The buyer could not perform that duty until the seller had subdivided the property and recorded a tract map. The court held that the seller could not unilaterally rescind the contract because of the buyer's failure to perform, when the seller's failure to record the tract map effectively prevented that performance.

Diamond was an action by a real estate broker against a seller, seeking the payment of a commission notwithstanding that a contemplated sale never took place. The seller defended on the grounds that it had no obligation to perform its own duties under the sales agreement because the buyer failed to tender the purchase price. The court recognized, simply, that the failure of the buyer to deposit the purchase price, although a defense to any action by the buyer against the seller, could not bar the real estate broker from bringing suit against the seller for the seller's own failure to perform.

It is true, as Ramirez points out, that the buyer in *Groobman* did not actually pay the full purchase price into escrow, and that he was permitted to condition his offer to deposit the full purchase price on the performance of the seller's duty to convey the premises free from the encumbrance of a lease. The court, however, concluded that the buyer had in no uncertain terms tendered his payment. The buyer wrote to the seller, through his attorney, that he was prepared "to fully perform his portion of the escrow agreement, *including deposit of the balance of the purchase price, which is tendered hereby.*" (159 Cal.App.2d 117, 120; italics in original.) The court viewed this communication as an offer of performance, and thus as a tender.

Each of the cases cited by Ramirez, therefore, were decided on facts that are not present here, and none of them alter the general rule that the failure by one party to perform or tender performance of a concurrent condition discharges the other party's performance.

Conclusion

The judgment is affirmed.

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Stein, Acting P.J.

We concur:

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Swager, J.

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Marchiano, J.